MOTION FILED

MAR 2 7 2002

(7)

No. 01-1229

IN THE

Supreme Court of the United States

PIERCE COUNTY,

Petitioner,

v.

IGNACIO GUILLEN as Legal Guardian for JENNIFER GUILLEN and ALMA GUILLEN, minors; and MARIANO GUILLEN, as Legal Guardian for PAULA GUILLEN and FATIMA GUILLEN,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Washington

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

LOUIS P. WARCHOT
DANIEL SAPHIRE
ASSOCIATION OF AMERICAN RAILROADS
Law Department
50 F Street, N.W.
Washington, D.C. 20001-1564
(202) 639-2505

CARTER G. PHILLIPS*
STEPHEN B. KINNAIRD
ROBERT N. HOCHMAN
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for the Association of American Railroads

March 27, 2002

* Counsel of Record

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

28pp

No. 01-1229

IN THE

Supreme Court of the United States

PIERCE COUNTY,

Petitioner,

v.

IGNACIO GUILLEN as Legal Guardian for JENNIFER GUILLEN and A'.MA GUILLEN, minors; and MARIANO GUILLEN, as Legal Guardian for PAULA GUILLEN and FATIMA GUILLEN,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Washington

MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Amicus curiae Association of American Railroads ("AAR") respectfully requests leave of this Court to file the following Brief in the above captioned matter. In support of its motion, AAR states as follows:

1. AAR requested the consent of both petitioner and respondents to file an *amicus curiae* brief in this case. The petitioner granted its consent in writing. Petitioner's written consent is being filed simultaneously with this Brief and Motion. Respondents refused their consent.

2. AAR is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 75 percent of the rail industry's line haul mileage, produce 93 percent of its freight revenues, and employ 91 percent of rail employees. In matters of significant interest to its members, AAR frequently

appears before Congress, administrative agencies, and the courts on behalf of the railroad industry.

AAR and its members have a substantial interest in vigorous enforcement of 23 U.S.C. § 409 because it plays an important role in the federal government's effort to promote railroad crossing safety. Section 409 specifically exempts from discovery or admission into evidence certain information "compiled or collected for the purpose of" promoting railway-highway crossing safety pursuant to 23 U.S.C. § 130. Congress chose to exempt this information from use in civil litigation to ensure that the program most effectively promotes safety. Denying § 409 its full effect, as the Washington Supreme Court has in this case, increases the cost to States and railroads of collecting and compiling crucial safety-related information and undermines the efficacy of the safety program, thus making railroad operation more hazardous.

3. AAR believes that its familiarity with the operation of important federal highway safety programs, such as the Railroad-Highway Crossing Safety Program, will aid in the Court's understanding of the issues presented in the Petition for Certiorari. This brief presents statutory background and legal analysis supplemental to that in the petition.

Respectfully submitted,

LOUIS P. WARCHOT
DANIEL SAPHIRE
ASSOCIATION OF AMERICAN RAILROADS
Law Department
50 F Street, N.W.
Washington, D.C. 20001-1564
(202) 639-2505

CARTER G. PHILLIPS*
STEPHEN B. KINNAIRD
ROBERT N. HOCHMAN
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for the Association of American Railroads

* Counsel of Record

March 27, 2002

QUESTION PRESENTED

Whether 23 U.S.C. § 409, which protects specified information "compiled or collected" in connection with certain federal highway safety programs from being subject to discovery, admitted into evidence, or being considered for any other purpose in any federal or state action for damages, is a valid exercise of Congress's power pursuant to the Spending Clause, the Commerce Clause or the Necessary and Proper Clause of the United States Constitution?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	iv
INTEREST OF *AMICUS CURIAE*	1
STATEMENT	2
A. Statutory Background	2
1. The Origins Of Coordinated Federal-State Highway Safety Programs	3
2. The Administrative Scheme	4
3. The Role of Section 409	6
B. The Decision Below	9
REASONS FOR GRANTING THE PETITION	11
CONCLUSION	20

TABLE OF AUTHORITIES

CASES

	Page
City of Atlanta v. *Watson*, 475 S.E.2d 896 (Ga. 1996)	19
Claspill v. *Missouri Pac. R.R.*, 793 S.W.2d 139 (Mo. 1990)	12
Coniker v. *State*, 695 N.Y.S.2d 492 (N.Y. Ct. Cl. 1999)	7, 12
Gibbs v. *Babbitt*,214 F.3d 483 (4th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001)	18
Guillen v. *Pierce County*, 31 P.3d 628 (Wash. 2001)	9, 10, 14, 17, 18
Harrison v. *Burlington N. R.R.*, 965 F.2d 155 (7th Cir. 1992)	7
Heart of Atlanta Motel, Inc. v. *United States*, 379 U.S. 241 (1964)	17
Hodel v. *Indiana*, 452 U.S. 314 (1981)	10, 13, 15, 16, 17
John Doe Agency v. *John Doe Corp.*, 493 U.S. 146 (1989)	19
Light v. *State*, 560 N.Y.S.2d 962 (N.Y. Ct. Cl. 1990)	7
McCulloch v. *Maryland*, 17 U.S. (4 Wheat) 316 (1819)	15
New York v. *United States*, 505 U.S. 144 (1992)	13
Palacios v. *Louisiana & Delta R.R.*, 775 So. 2d 698 (La. Ct. App. 2000)	11, 14
Reichert v. *State Dep't of Transp. & Dev.*, 694 So. 2d 193 (La. 1997)	7
Robertson v. *Union Pac. R.R.*, 954 F.2d 1433 (8th Cir. 1992)	7, 12, 19
Sawyer v. *Illinois Cent. Gulf R.R.*, 606 So. 2d 1069 (Miss. 1992)	12
Seaton v. *Johnson*, 898 S.W.2d 232 (Tenn. Ct. App. 1995)	12
South Dakota v. *Dole*, 483 U.S. 203 (1987)	13, 14

TABLE OF AUTHORITIES—continued

	Page
Southern Pac. Transp. Co. v. *Yarnell*, 890 P.2d 611 (Ariz. 1995)	8
United States v. *Lopez*, 514 U.S. 549 (1995)	11, 15, 18
United States v. *Morrison*, 529 U.S. 598 (2000)	11, 15, 16, 18
Wiedeman v. *Dixie Elec. Membership Corp.*, 627 So. 2d 170 (La. 1993)	8

STATUTES AND REGULATION

	Page
Federal-Aid Highway Act of 1970, Pub. L. 91-605, 84 Stat. 1713	4
23 U.S.C. § 101(b)	16
§ 130	2, 5, 6
§ 144	4, 5
§ 152	5, 6
§ 409	2, 7, 14
45 U.S.C. §§ 51-60	12
23 C.F.R. § 924.9(a)(1)	5, 9
§ 924.13(a)(2)	6, 9
§ 924.15	8

LEGISLATIVE HISTORY

	Page
H.R. Rep. No. 93-118 (1973), *reprinted in* 1973 U.S.C.C.A.N. 1859	3
H.R. Rep. 104-246 (1995), *reprinted in* 1995 U.S.C.C.A.N. 522	8
H.R. Conf. Rep. 102-404 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679	8

RULE

	Page
Sup. Ct. R. 10(c)	11

TABLE OF AUTHORITIES—continued

OTHER AUTHORITIES — Page

Federal R.R. & Highway Admins., U.S. Dep't of Transp, *Railroad-Highway Safety Part I: A Comprehensive Statement of the Problem* (1972) 3

Federal R.R. & Highway Admins., U.S. Dep't of Transp., *Railroad-Highway Safety Part II: Recommendations for Resolving the Problem* (1972) 3

U.S. Dep't of Transp., *National Railroad-Highway Crossing Inventory Update Manual* (1976) 6

U.S. Dep't of Transp., *Traffic Safety Facts 1998* (1999) 4

U.S. Gov't Accounting Office, *Report to Congressional Requesters, Railroad Safety: Status of Efforts to Improve Railroad Crossing Safety* (Aug. 1995) 4, 5

IN THE
Supreme Court of the United States

No. 01-1229

PIERCE COUNTY,
Petitioner,

v.

IGNACIO GUILLEN as Legal Guardian for JENNIFER GUILLEN and ALMA GUILLEN, minors; and MARIANO GUILLEN, as Legal Guardian for PAULA GUILLEN and FATIMA GUILLEN,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Washington

BRIEF OF *AMICUS CURIAE* THE ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

INTEREST OF *AMICUS CURIAE* *

The Association of American Railroads ("AAR") is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 75 percent of the rail industry's line haul mileage, produce 93 percent of its freight revenues, and employ 91 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies, and the courts on behalf of the railroad industry.

Vigorous enforcement of 23 U.S.C. § 409 is a matter of substantial concern to railroads because it plays an important

* Pursuant to Rule 37.6 of the Rules of the Court, *amicus* states that no counsel for a party has authored this brief in whole or in part, and no person or entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

role in the federal government's effort to promote railroad crossing safety. Section 409 specifically exempts from discovery or admission into evidence certain information "compiled or collected for the purpose of" promoting railway-highway crossing safety pursuant to 23 U.S.C. § 130 ("Section 130 program"). Section 130 makes federal funds available for use in improving safety at railway-highway crossings. Congress chose to exempt this information from use in civil litigation to ensure that the program most effectively promotes safety. To deny § 409 its full effect, as the Washington Supreme Court has in this case, directly harms railroads in two ways. First, by increasing the cost to States and railroads of collecting and compiling this crucial safety-related information, the Washington Supreme Court's decision undermines the efficacy of the safety program, thus making the operation of railroads more hazardous. Second, contrary to Congress's intent, it leaves railroads exposed to damages based on information that the railroads themselves are required to collect and submit to state departments of transportation (and the Federal Railroad Administration) for compilation in an effort to promote safety.

STATEMENT

The ruling issued by the Washington Supreme Court will have a dramatic impact on how important federal highway safety programs function. Therefore, this Court may find it useful to understand the historical circumstances that spurred the creation of the federal highway safety programs, the relevant details of those programs, and their relationship to § 409. With that background, the impact of the Washington Supreme Court's decision can be fully appreciated.

A. Statutory Background.

Section 409 is a crucial component of three distinct federal highway safety programs: The Railway-Highway Crossing Program (§ 130), The Highway Bridge Replacement and

Rehabilitation Program (§ 144), and The Hazard Elimination Program (§ 152). These programs were created by federal highway legislation from the 1970s that displaced a traditionally political process for identifying and funding highway projects. Congress enacted a new data-driven, administrative model for prioritizing highway safety projects. The new model has saved thousands of lives.

1. The Origins Of Coordinated Federal-State Highway Safety Programs.

As the nation's highway system grew through the 1960s and early 1970s, the nation experienced a troubling growth in traffic accidents. By 1973 Congress voiced concern about an "escalating tide of mayhem on our highways," noting that in 1972 the nation lost over $40 billion and 56,000 lives, and more than 4 million persons were injured. H.R. Rep. No. 93-118 (1973), *reprinted in* 1973 U.S.C.C.A.N. 1859, 1888-89. Of particular concern to *amicus*, through the late 1960s, the nation was experiencing a high volume of railroad crossing casualties and fatalities. See Federal R.R. & Highway Admins., U.S. Dep't of Transp., *Railroad-Highway Safety Part I: A Comprehensive Statement of the Problem* 6 tbl.1 (1972).

Congress recognized "the necessity for improved coordination and cooperation on a program and project level between Federal, State and local authorities, and between the public and private sectors," noting the need for a "multi-pronged attack on those highway-related factors which contribute most to accidents." H.R. Rep. No. 93-118, *reprinted in* 1973 U.S.C.C.A.N. at 1889. The Secretary of Transportation had already concluded that an effective effort to improve railroad crossing safety would require "national coordination." Federal R.R. & Highway Admins., U.S. Dep't of Transp., *Railroad-Highway Safety Part II: Recommendations for Resolving the Problem* iii (1972).

These federal highway programs have played an instrumental role in the dramatic reduction of highway fatalities over the last three decades. See U.S. Dep't of Transp., *Traffic Safety Facts 1998*, at 15 tbl.2 (1999) (69% decline from 1968 to 1998 in fatality rate per 100 million vehicle miles traveled). The Section 130 program, for example, has helped reduce the number of accidents and fatalities at railroad crossings. In the late 1970s, there were an average of 864 fatalities and 11,516 accidents per year. U.S. Gov't Accounting Office, *Report to Congressional Requesters, Railroad Safety: Status of Efforts to Improve Railroad Crossing Safety* 18 (Aug. 1995) ("GAO Report"). The federal government estimates that the Section 130 program had, by May 1994, "prevented more than 7,600 fatalities and 33,500 nonfatal injuries." *Id.* But despite such advances, there remains much to be done. "Accidents at railroad crossings are the leading cause of deaths associated with the railroad industry; almost half of all rail-related deaths in the United States are the result of collisions of trains and vehicles at public railroad crossings." *Id.* at 2.

2. The Administrative Scheme.

Congress first implemented an administrative-based federal highway safety program in the Federal-Aid Highway Act of 1970. In that watershed legislation, Congress mandated that any State participating in the federal highway program establish "a State agency which shall have adequate powers, and be suitably equipped and organized to carry out" the program. Pub. L. 91-605, § 203(a), 84 Stat. 1713, 1741 (1970) (amending 23 U.S.C. § 402(b)(1)(A)). Congress, at first, focused on bridges. A new program, codified at 23 U.S.C. § 144, called for the States and the federal government to "inventory all bridges located on any of the Federal-aid systems ...[, to] classify them according to their serviceability, safety, and essentiality for public use; and ... based on that classification, assign each a priority for replacement." Pub. L. 91-605, § 204(a), 84 Stat. at 1742.

The basics of the data-driven approach were thus put in place: (1) identify all relevant highway locations, (2) prioritize individual locations in terms of public importance and safety risks presented, and (3) direct funds to the locations which promise the greatest public safety return on the public's investment. This approach recognizes that "[m]aximizing the return from federal funds requires targeting them to the greatest need." GAO Report at 4. To direct federal funds properly, the federal government must have at its disposal a comprehensive account of accidents and analysis of how best to avoid them.

This model was carried forward into the Railway-Highway Crossing Program (§ 130) and the Hazard Elimination Program (§ 152). The Section 130 program requires the States to "systematically maintain a survey of all highways to identify those railroad crossings which may require separation, relocation, or protective devices, and establish and implement a schedule of projects for this purpose." 23 U.S.C. § 130(d). The Hazard Elimination Program, which is directed at various hazards (such as poor marking or roadside obstacles) on roads and at intersections, similarly requires the systematic gathering of data and prioritizing of safety-related projects. *Id.* § 152(a).

Congress deemed cooperation between State and Federal entities critical to the success of the data-gathering and prioritizing model of the new federal schemes. Section 144 requires the Secretary of Transportation, working with the States, to gather the relevant information on bridges. *Id.* § 144(b)-(c). Sections 130 and 152 place the primary data-gathering responsibilities on the States. *Id.* §§ 130(d), 152(a). For example, the regulations enacted pursuant to § 130 require the States, *inter alia*, to "collect[] and maintain[] a record of accident, traffic, and highway data, including, for railroad-highway grade crossings, the characteristics of both highway and train traffic," 23 C.F.R. § 924.9(a)(1), and to create a "record of accident experience before and after the

implementation of a highway safety improvement project," *id.* § 924.13(a)(2). Both §§ 130 and 152 contemplate federal oversight. 23 U.S.C. §§ 130(g), 152(g).

Further, private entities play a crucial role in the success of federal safety programs. The Department of Transportation has recognized that while "local, State, and Federal agencies have collected and maintained information about railroad-highway crossings, most crossing information systems [had] been fragmented and incomplete." U.S. Dep't of Transp., *National Railroad-Highway Crossing Inventory Update Manual* B-1 (1976) ("Update Manual"). Because railroad crossing safety data "can continue to be useful only if maintained and updated" as incidents occur, *id.* at A-1, the Department of Transportation solicited and received the cooperation of the railroad industry in the data-gathering endeavor. The railroads and the government, for example, equally shared the cost of developing a "'Comprehensive National Railroad-Highway Crossing Information and Numbering System.'" *Id.* at B-1. The Update Manual establishes procedures that are "designed to ensure availability and use of an up-to-date railroad-crossing data base and to ensure continued use of the channels of communication [between various public and industry entities] established during the initial inventory," and assigns specific data collection tasks to the States and to the railroads. *Id.* at C-1, C-3 & tbl.1.

3. The Role of Section 409.

As the highway-safety legislation was implemented, it became clear that the effective administration of these programs was undermined by the threat of tort litigation. Implicit in the federally mandated prioritization programs is the understanding that funds are not available for immediate rectification of all highway safety risks; this is a long-term effort in which even known, risky situations would be left unaddressed so that resources could be spent on the locations posing the greatest dangers to life and health. The programs,

as described above, required comprehensive data gathering and analysis, even of the unimproved sites. The Solicitor General has observed the concern this creates:

> If reports and data concerning potential highway safety hazards are subject to discovery in tort actions, States and private parties will likely be deterred from compiling complete and accurate information about such hazards. As a result, federal highway safety programs—which depend on information about safety problems provided by the States and private entities such as railroads—will be jeopardized.

Brief for the United States as *Amicus Curiae* at 6, *State of Alabama Highway Dep't* v. *Boone*, No. 90-1412 (U.S. 1991). Indeed, § 409 grew out of a proposal by the Federal Highway Administration, made at the behest of the States, to address precisely this fear. *Id.* at 10.

To ensure that the States' data collection and analysis procedures required by the federal program are exhaustive and candid, Congress enacted 23 U.S.C. § 409. Section 409 ensures that the safety related information collected and compiled by the States and private entities is not used as a tool in private litigation against the very parties assisting the public safety effort.[1] In short, Congress has determined that the benefit to public safety of nondisclosure outweighs the interests individual plaintiffs have in access to this information. *Coniker* v. *State*, 695 N.Y.S.2d 492, 495 (N.Y. Ct. Cl. 1999).

Over the years, Congress has amended § 409 to ensure that its underlying purpose receives full effect from both federal and state courts. For example, before 1991 § 409 specifically excluded the protected material from admission in evidence,

---

[1] *Harrison* v. *Burlington N. R.R.*, 965 F.2d 155, 160 (7th Cir. 1992); *Robertson* v. *Union Pac. R.R.*, 954 F.2d 1433, 1435 (8th Cir. 1992); *Reichert* v. *State Dep't of Transp. & Dev.*, 694 So. 2d 193, 197 (La. 1997).

but said nothing about discovery. As a result, some courts permitted discovery of the information even though such information was inadmissible. See *Light* v. *State*, 560 N.Y.S.2d 962, 965 (N.Y. Ct. Cl. 1990). In 1991 Congress amended § 409 to make clear that the protected material was neither discoverable nor admissible in evidence. H.R. Conf. Rep. 102-404, at 332 (1991), *reprinted in* 1991 U.S.C.C.A.N. 1679, 1712.

In addition, throughout the 1990s some court decisions had undermined § 409's basic purpose by concluding that it did not exclude the "raw data" that formed the bases of the reports that States would submit to the federal government when applying for federal funds.[2] In 1995, Congress corrected these misinterpretations by amending the statute to protect information "compiled or collected," whereas before the statute had only said that information "compiled" was protected. Congress explained the change:

> It is intended that raw data collected prior to being made part of any formal or bound report shall not be subject to discovery or admitted into evidence in a Federal or State court proceeding or considered for other purposes in any action for damages arising from any occurrence at a location mentioned or addressed in such data.

H.R. Rep. 104-246, at 59 (1995), *reprinted in* 1995 U.S.C.C.A.N. 522, 551. Put another way, Congress intended to protect more than the formal report that regulations required the States to submit to the federal government. See, *e.g.*, 23 C.F.R. § 924.15. Congress also wanted to protect the

---

[2] *See, e.g.*, *Wiedeman* v. *Dixie Elec. Membership Corp.*, 627 So. 2d 170, 173 (La. 1993) (holding that previous version of § 409 protects a state's end-product analysis of data, but not the "unedited factual material" collected to produce the end product); *Southern Pac. Transp. Co.* v. *Yarnell*, 890 P.2d 611, 613 (Ariz. 1995) (holding that pre-1995 version of § 409 does not protect the accident reports that are themselves compiled pursuant to § 409).

data that other regulations required the States to collect in connection with the program. See, *e.g.*, *id.* §§ 924.9(a)(1), 924.13(a)(2).

B. The Decision Below.

A bare majority of the Washington Supreme Court has concluded that Congress lacked the authority to ensure that § 409 had the reach required to accomplish its purposes. The court did not question Congress's "authority to enact § 409 in its *pre* 1995 form, insofar as the privilege was understood to apply only to materials and data created *exclusively* to comply with the federal government's mandates" in the relevant highway safety statutes. *Guillen* v. *Pierce County*, 31 P.3d 628, 647 n.26 (Wash. 2001). The court believed Congress had the power to render those documents privileged because "*but-for* the federal mandates, such materials would not exist." *Id.* at 651. But when Congress amended § 409 in 1995, it brought within its sphere of protection documents that would have existed even without the various federal highway safety programs. This, in the court's view, unconstitutionally "intrude[d] upon state sovereignty by barring state and local courts from admitting into evidence or allowing pretrial discovery of routinely created traffic and accident related materials ... essential to the proper adjudication of claims brought under state and local law." *Id.* at 655. Thus, the court limited the effect of § 409 to materials "that are *originally* 'compiled'—i.e., created, composed, recorded—for the *specific* purpose[s]" connected with the various federal highway safety programs. *Id.*

The Washington Supreme Court considered and rejected three different grounds for upholding § 409. First, although recognizing that the Spending Clause permits Congress to "offer states the option of accepting federal funds 'with strings attached'—even when those 'strings' interfere with the basic functioning of state government," the court concluded that "no valid federal interest in the operation of the federal safety enhancement program is reasonably served"

by privileging materials that would have been created even if the federal program did not exist. *Id.* at 651.

Second, the court recognized that legislation designed to promote safety on the nation's public highways is a valid exercise of Congress's authority under the Commerce Clause to "'regulate and protect the instrumentalities of interstate commerce.'" *Id.* at 653 (quoting *United States* v. *Lopez*, 514 U.S. 549, 558 (1995)). But, purporting to rely on *Hodel* v. *Indiana*, 452 U.S. 314, 329 n.17 (1981), the court concluded that even if the "'regulatory scheme when considered as a whole'" is valid, a specific federal statute could be declared unconstitutional if a court were to find it was not an "'integral part'" of that general regulatory scheme. *Guillen*, 31 P.3d at 654 (quoting *Hodel*, 452 U.S. at 329 n.17). Mimicking its Spending Clause analysis, the court held that privileging materials that "would exist even had a federal safety enhancement program never been created" could not be "characterized as an 'integral part' of the Federal-aid highway system's regulation." *Id.* at 654. Finally, the court determined that the Necessary and Proper Clause did not authorize § 409, for essentially the same reasons. *Id.* at 654-55.

The court held that under its narrowed version of § 409, Pierce County must disclose four out of five items described in its opinion. *Id.* at 655-56. Those items include two sets of accident reports collected by location in order to comply with the relevant federal highway safety program, and two collision diagrams used to determine whether the design of the intersection was a causative factor in the accidents described, which is also required by federal law. *Id.* at 634 & n.1.

Three justices would have upheld § 409 by interpreting it to protect only documents held in a collection by the state agency charged with complying with federal highway-safety program regulations. *Id.* at 657-59 (Madsen, J., concurring). Put concretely, when an accident occurs, law enforcement officials arrive on the scene and record certain information concerning the accident. Law enforcement officials may

maintain that report in their files. State highway safety officials gather copies of all such reports into their own files for analysis in compliance with federal highway-safety program regulations. The majority reads § 409 to cover both the accident report in the highway safety official's files and the law enforcement official's files. The concurrence reads it to cover only the report in the highway-safety official's files.

REASONS FOR GRANTING THE PETITION

The Washington Supreme Court has held that the Constitution forbids Congress to exempt from discovery and admission into evidence various materials that the States and private entities collect and compile for the purpose of determining how to best to direct federal highway safety funds. This Court has not hesitated to review lower court decisions that, like this one, break new ground and strike down federal statutes for exceeding Congress's delegated powers under Article I, Section 8. *United States* v. *Morrison*, 529 U.S. 598, 605 (2000); *United States* v. *Lopez*, 514 U.S. 549, 552 (1995). Because the striking down of a federal statute as unconstitutional is a serious judicial intervention into the democratic process, it represents the archetypal "important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c).

Review is especially important in this case because the Washington Supreme Court's ruling effectively narrows § 409 in a way that conflicts with the rulings of other courts, and thus jeopardizes the uniform administration of an important federal safety program that relies on uninhibited disclosure and analysis of data. One other state court has specifically concluded that the 1995 amendment to § 409 is constitutional. *Palacios* v. *Louisiana & Delta R.R.*, 775 So. 2d 698, 703 (La. Ct. App. 2000) (upholding § 409 under Spending Clause, rejecting 10th Amendment challenge). Three other courts, both before and after the 1995 amendment, have applied § 409 to materials that were not

created solely for the purpose of complying with any of the federal highway safety programs, and have done so without questioning the constitutionality of § 409. *Coniker*, 695 N.Y.S.2d at 496 (holding that post-1995 version of § 409 applies to information that the New York Transportation Department officials would have collected even if the federal highway safety programs did not exist); *Robertson* v. *Union Pac. R.R.*, 954 F.2d 1433, 1435 n.3 (8th Cir. 1992) (holding that pre-1995 statute applied to certain information even though it "was not collected or utilized solely for federal funding projects"); *Seaton* v. *Johnson*, 898 S.W.2d 232, 236 (Tenn. Ct. App. 1995) (applying pre-1995 statute and holding that "[i]t would be an anomaly for this Court to deny access to the State's copy of its report to the federal government only to require the State to compile from its records a report to plaintiff identical with that furnished to the federal government").[3] This Court should grant the petition for certiorari to ensure the uniform application of § 409, which will provide for the most effective implementation of the federal highway safety programs.

Additionally, the Washington Supreme Court's narrowing of § 409 creates an especially urgent need for this Court's review. As a result of the court's ruling, § 409 has a different scope in federal and state courts within Washington state. Not only is this plainly contrary to Congressional intent, but it invites forum shopping. Tort plaintiffs in Washington, whether suing under state or federal law (such as the Federal Employers Liability Act, 45 U.S.C. §§ 51-60) will seek the weakened application of § 409 in state court.

---

[3] In addition, two other state supreme courts have rejected challenges to the constitutionality of the pre-1995 version of § 409 without elaborating on that version's scope. *Sawyer* v. *Illinois Cent. Gulf R.R.*, 606 So. 2d 1069, 1072-74 (Miss. 1992); *Claspill* v. *Missouri Pac. R.R.*, 793 S.W.2d 139 (Mo. 1990).

Finally, as demonstrated below, the Washington Supreme Court's conclusion is not only out of step with other courts around the nation, but also distorts this Court's Spending Clause and Commerce Clause jurisprudence. The Washington Supreme Court's Spending Clause analysis cannot be squared with this Court's analysis in *South Dakota* v. *Dole*, 483 U.S. 203 (1987). In addition, based on its misreading of this Court's decision in *Hodel* v. *Indiana*, 452 U.S. 314 (1981), the Washington Supreme Court has announced a new rule of Commerce Clause jurisprudence that conflicts with the rule in the Fourth Circuit, inviting courts to second guess Congress's decision about how best to accomplish its legitimately chosen ends.

Spending Clause. Congress has broad power to impose conditions upon a state's voluntary receipt of federal funds. The reason is simple. When the receipt of federal funds is the product of a state's voluntary choice, any conditions attached to those funds are themselves accepted by the state voluntarily as well. Far from an affront to principles of federalism, Spending Clause conditions respect those principles by permitting federal and state governments to cooperate in advancing the general welfare. *New York* v. *United States*, 505 U.S. 144, 167-68 (1992).

The Washington Supreme Court's decision is flatly contrary to this Court's Spending Clause analysis in *South Dakota* v. *Dole*, 483 U.S. at 208 n.3. In *Dole*, the Court found that the relationship between a uniform drinking age and Congress's goal of promoting safe use of federally funded highways was sufficiently close to satisfy the Spending Clause. *Id.* at 208-09. The fact that the drinking age condition was overinclusive did not lead the Court to invalidate it. See *id.* at 214-15 (O'Connor, J., dissenting) (noting that drinking age restriction was overinclusive because it stopped youths from drinking even when they were not planning on driving). Though this Court in *Dole* left open precisely how closely related a condition must be to

Congress's legislative purpose, *id.* at 208 n.3, the facts of *Dole* make clear that if the condition advances the goal, the fact that it is overinclusive does not invalidate the condition.

The Washington Supreme Court, relying largely on Justice O'Connor's dissent in *Dole*, ruled that the 1995 amendment to § 409 is beyond Congress's Spending Clause power because it is overinclusive. The court's analysis is wrong. There is nothing fatally overinclusive in protecting data and reports "compiled or collected for the purpose of" highway safety evaluations, which are conducted "pursuant to" federal statute. 23 U.S.C. § 409. Further, as *Dole* makes clear, any overinclusivity is constitutionally irrelevant. The state court did not deny that Congress can require the States to engage in extensive data-gathering and analysis as a condition on receiving federal highway funds. Moreover, the court never denied that privileging the results of those efforts advances Congress's valid goal of ensuring safety through thorough data-gathering and analysis. Yet the court struck down § 409 because, in its view, Congress cannot enforce privileges in state court for data and documents that were created for other purposes (even if the only reason for maintaining a compilation of those documents by highway site is the mandate of the federal programs). *Guillen*, 51 P.3d at 645-46, 651, 655. In short, the Washington Supreme Court never denied that the 1995 amendment to § 409 advances Congress's legitimate interests. The court simply concluded that it swept in too much material, and struck down the amendment in its entirety. This is contrary to *Dole*.

In contrast to the Washington Supreme Court, the Louisiana Court of Appeals has properly applied *Dole* to the 1995 amendments to § 409. The Louisiana court has concluded that § 409 is within Congress's Spending Clause power because it is closely enough related to the federal interest of "'encourag[ing] participation in a scheme that ensures, by prioritization, deliberative spending of federal funds.'" *Palacios*, 775 So. 2d at 703.

Dole aside, the statute is unquestionably valid because it is "necessary and proper" to Spending Clause legislation. Section 409 is not structured as a "condition" on the receipt of federal funds at all. The Spending Clause "condition" imposed on the States requires data-collection and analysis. Section 409 is a substantive rule of law, applicable in all federal and state courts, that encourages thoroughness by precluding access to, use of, or reliance upon data and analysis generated by the federal programs. For example, if suit were brought in a state that had declined federal highway funds, but the underlying accident had occurred in a state that had accepted those funds, § 409 would still prevent the plaintiff from obtaining the data collected pursuant to federal programs in connection with the accident location. Such a result is proper because Congress has the power to ensure that its Spending Clause programs function properly. *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat) 316, 421 (1819) ("Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional.").

Congress wanted states and private entities to be free of concern when collecting and analyzing highway safety data. The 1995 amendment advances that goal. The Washington Supreme Court, employing a narrow view of Congress's Spending Power in conflict with this Court's decision in *Dole*, has undermined that purpose and produced uneven application of § 409. This Court should clarify the scope of the Spending Power and in the process ensure uniform application of § 409.

Commerce Clause. The Washington Supreme Court has badly misread this Court's decisions in *Hodel* v. *Indiana*, 452 U.S. 314 (1981), *United States* v. *Lopez*, 514 U.S. 549 (1996) and *United States* v. *Morrison*, 529 U.S. 598 (2000), as severely constraining Congress's Commerce Clause power. The Washington Supreme Court has asserted that these cases

direct lower courts to examine the individual components of complex statutory schemes that relate to interstate economic activity and to invalidate any specific statutory provision of the scheme that in its judgment does not directly advance a legitimate Commerce Clause goal. If allowed to stand, the Commerce Clause analysis of the Washington Supreme Court could potentially prevent Congress from responding in a comprehensive way to matters affecting the national economy. This Court should correct the state court's undue narrowing of congressional power.

This Court has recently reaffirmed that the Commerce Clause authorizes Congress to "'regulate and protect the instrumentalities of interstate commerce, or persons or things in interstate commerce, even though the threat may come only from intrastate activities.'" *Morrison*, 529 U.S. at 609. Further, this Court has recognized that Congress may "'regulate those activities having a substantial relation to interstate commerce.'" *Id.* Congress has specifically concluded that the inadequacies of the highway system have an impact on interstate commerce. 23 U.S.C. § 101(b).

In *Hodel*, the Court described how courts should assess Commerce Clause challenges to particular components of far-reaching regulatory schemes. The district court in *Hodel* had concluded that 15 different provisions of the Surface Mining and Reclamation Control Act of 1977 could have been justified as Commerce Clause legislation only with respect to how they helped reduce air and water pollution. 452 U.S. at 322-23. The party challenging the Act argued that several of these provisions do not contribute to either of these ends. *Id.* at 329 n.17. The Court rejected the claim:

> A complex regulatory program ... can survive a Commerce Clause challenge without a showing that every single facet of the program is independently and directly related to a valid congressional goal. It is enough that the challenged provisions are an integral part of a regulatory program and that the regulatory scheme when considered as a whole satisfies this test.

Id.

Following *Hodel*, court review should focus on the scheme as a whole. The general orientation is one of deference to Congress's chosen methods to respond comprehensively to matters affecting the national economy. *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U.S. 241, 261-62 (1964) (the structure of a federal regulatory scheme that is, as a general matter, constitutional "is within the sound and exclusive discretion of Congress"). The Washington Supreme Court correctly recognized that the federal highway safety programs themselves clearly contain "a sufficient nexus" to interstate commerce to "justify the 'regulatory scheme when considered as a whole.'" *Guillen*, 31 P.3d at 654. Following *Hodel* and *Heart of Atlanta Motel*, the court should then have deferred to Congress's chosen method of achieving its legitimate objective.

Instead, the Washington Supreme Court took a novel turn. It seized on the language in *Hodel* indicating that the various components of a regulatory program must all be "integral" to the program's operation to authorize aggressive judicial review of Congress's chosen means to achieve its legitimate ends. It claimed that this Court's recent decisions in *Lopez* and *Morrison* supported its novel reading of *Hodel* because in those decisions this Court had "eroded" the "precedential authority" that would require courts to defer to Congress on matters affecting state sovereignty. *Id.* at 653.

As noted above, the court ultimately concluded that § 409 was not an "integral part" of the federal highway safety programs because the court could not "see how [any] federal purposes are reasonably served by also barring the discovery and admissibility in state court of routinely prepared state and local traffic and accident materials and data that would exist even had a federal safety enhancement program never been

created." *Id.* at 654. Put another way, the court interpreted the "integral part" language in *Hodel* to require lower courts to examine whether any challenged component of a federal regulatory program itself independently and directly serves a valid Commerce Clause purpose. *Hodel* was thus read to contradict itself.

No other court has read *Morrison* and *Lopez* to alter the rule of *Hodel* and *Heart of Atlanta Motel* so fundamentally. To the contrary, the Fourth Circuit has specifically rejected such a reading. The Fourth Circuit was asked to invalidate a regulation promulgated pursuant to the Endangered Species Act, because the particular regulation did not itself substantially affect interstate commerce. The court explained that "given that Congress has the ability to enact a broad scheme for the conservation of endangered species, it is not for the courts to invalidate individual regulations." *Gibbs* v. *Babbitt*, 214 F.3d 483, 498 (4th Cir. 2000), *cert. denied*, 531 U.S. 1145 (2001).

The Fourth Circuit's analysis is fully consistent with this Court's approach in *Morrison* and *Lopez*. *Morrison* left no doubt that Congress's power under the Commerce Clause is strongest when Congress is regulating economic activity; Congress's claim to authority is weaker when it attempts to regulate intrastate violent conduct. *Morrison*, 529 U.S. at 610. And *Lopez* reaffirmed that courts should uphold "an essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut unless the intrastate activity were regulated." 514 U.S. at 561. Far from cutting back on *Hodel*'s crucial holding, *Lopez* and *Morrison* both fully support the continued vitality of analyzing a regulatory scheme as a whole, not piecemeal.

Under a properly deferential standard, the 1995 amendment to § 409 is constitutional. It is sufficiently connected to Congress's effort to promote highway safety, and thereby protect the channels of interstate commerce, to satisfy the "integral part" standard of *Hodel*. Congress may ensure that

public and private officials are not deterred from providing the most thorough collection and analysis of safety related data. *Robertson*, 954 F.2d at 1435. *City of Atlanta* v. *Watson*, 475 S.E.2d 896, 903 (Ga. 1996) (federal provision privileging noise exposure maps created in compliance with federal Noise Abatement Act is "integral part" of federal program). Section 409 survives even if, as the Washington Supreme Court held, it reaches documents that were originally created and retained for reasons other than the need to comply with federal law. Congress may well have concluded that once a document is gathered into a federally mandated collection, it would make little sense to undermine the privilege by allowing the plaintiff to access the document through other means. Cf. *John Doe Agency* v. *John Doe Corp.*, 493 U.S. 146, 154-55 (1989) (holding that FOIA exemption for documents "compiled for law enforcement purposes" includes documents originally created for another purpose but which the government later compiled for law enforcement purposes, and thus prevents disclosure even by the separate government department that originally created it). Congress was interested in privileging certain *information* that can help promote public safety, not just particular *documents* in particular locations.

Section 409 is a legitimate exercise of Congress's Commerce Clause authority because it is an "integral part"—a part that reasonably (even if indirectly) promotes the ultimate aim—of a lawfully enacted regulatory scheme. This Court should clarify that Congress retains the power, under the Commerce Clause, to use whatever reasonable means it deems proper to accomplish its legitimate ends.

CONCLUSION

The petition should be granted.

Respectfully submitted,

LOUIS P. WARCHOT
DANIEL SAPHIRE
ASSOCIATION OF AMERICAN RAILROADS
Law Department
50 F Street, N.W.
Washington, D.C. 20001-1564
(202) 639-2505

CARTER G. PHILLIPS*
STEPHEN B. KINNAIRD
ROBERT N. HOCHMAN
SIDLEY AUSTIN BROWN & WOOD LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000

Counsel for the Association of American Railroads

* Counsel of Record

March 27, 2002